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No. 82-834

IN THE

Supreme Court of the United States

October Term, 1982

LYNN G. WALCK, On Behalf of Himself And Representatively On Behalf Of Himself And Others Similarly Situated,

Petitioner,

v.

AMERICAN STOCK EXCHANGE, INC.
and
NEW YORK STOCK EXCHANGE, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a private right of action by public investors against national securities exchanges should be judicially implied under former Section 6 of the Securities Exchange Act of 1934, 15 U.S.C. § 78f (1970).

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents American Stock Exchange, Inc. and New York Stock Exchange, Inc. ("the Exchanges") respectfully request that this Court deny the petition for a writ of certiorari.*

Opinions Below

The opinions below are described in the petition and reproduced in the appendix to the petition. Subsequent to

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* In accordance with Rule 28.1 of the rules of this Court, a listing of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each respondent is set forth in the appendix.

the filing of the petition, the opinion of the Court of Appeals was officially reported at 687 F.2d 778.

Statute Involved

Section 6 of the Securities Exchange Act of 1934 (15 U.S.C. § 78f (1970)) [hereinafter "Section 6"] is reproduced in the appendix to the petition at A102-106.

Statement of the Case

In 1953, petitioner Lynn G. Walck, a former executive with Baldwin-Lima-Hamilton Corporation, established a brokerage account with Edwards & Hanly through Edward Kelly, manager of a local Edwards & Hanly office. Edwards & Hanly was a broker-dealer registered with the Securities and Exchange Commission ("SEC") and a member firm of both Exchanges. Walck's account was handled as a cash account until 1959 when, at the prompting of Kelly, Walck opened a margin account. Although Walck deposited cash and securities in excess of $100,000 in his margin account between 1959 and 1973, he alleged that at no time did Kelly or Edwards & Hanly ever explain to him what a margin account was or how it worked. Nevertheless, Walck, through his margin account and through the representations and recommendations of Kelly, increased the value of his securities holdings from approximately $107,500 to approximately $384,000.

Over the period 1969 to May 1973, Walck, in reliance upon the representations and recommendations of Kelly, liquidated all of his securities holdings and purchased through Edwards & Hanly 32,300 shares of Trans-Lux Corporation ("Trans-Lux") stock at prices ranging between $44.50 and $8.00 per share, at a total cost of approximately $384,000. Walck purchased additional Trans-Lux securities through other brokerage firms in the Philadelphia area during this interval as well.

From January 1969 to May 1973, the price of Trans-Lux stock fluctuated between $58.75 and $6.00; however, the general trend of the price of Trans-Lux stock was downward. As a result, Walck's account became undermargined and, on

May 21, 1973, Edwards & Hanly sent a telegram to Walck advising him that his account was undermargined by $43,000. Edwards & Hanly warned that if this deficiency were not immediately covered, Walck's securities would be liquidated in a sufficient amount to bring the account into proper margin.

Edwards & Hanly sent Walck similar margin maintenance calls in June, August, and September 1973. The account remained undermargined. Finally, on January 9, 1974, Edwards & Hanly liquidated Walck's account of Trans-Lux stock at a price of $2.00 per share, leaving a deficiency in his account of approximately $108,000.

Two months later, in March 1974, Walck commenced an action in the United States District Court for the Eastern District of Pennsylvania against Kelly and Edwards & Hanly, entitled *Walck v. Edwards & Hanly and Edward Kelly* (74 Civ. 664), alleging that the defendants in handling Walck's account had violated Section 17(a) of the Securities Act of 1933, Sections 7, 10(b), and 15(c) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, Regulation T of the Federal Reserve Board, and common law. Walck sought compensatory damages in excess of $100,000, punitive damages of $500,000, and a declaration that Walck did not owe Edwards & Hanly the deficiency balance in his account.

Walck's action against Kelly and Edwards & Hanly was in the advanced stages of discovery when Edwards & Hanly, on September 13, 1976, filed a Chapter XI petition in bankruptcy. By order of the Bankruptcy Court, Walck's action against Kelly and Edwards & Hanly has been stayed.

On January 13, 1977, more than three years after his Edwards & Hanly brokerage account was liquidated, Walck commenced this action as a class action against the Exchanges, alleging violations of Section 17(a) of the Securities Act of 1933, Sections 6, 7, 9(a), 10(b), and 15(c) of the Securities Exchange Act of 1934 ("Exchange Act"), Rule 10b-5 thereunder, Regulation T of the Federal Reserve Board,

and common law. All of Walck's claims against the Exchanges were dismissed by the District Court as legally insufficient. The Court of Appeals affirmed unanimously.

Reasons for Denying the Petition

I.

CONSTRUCTION OF FORMER SECTION 6 OF THE SECURITIES EXCHANGE ACT OF 1934 PRESENTS AN ISSUE OF LIMITED APPLICABILITY WHICH WILL NOT RECUR

The Court of Appeals properly ruled that "because all relevant events concluded in 1974, we apply the statute as it then existed and not as amended in 1975." (A*12) Thus, the question presented in this case involves implication of a private right of action from a statute which has ceased to have any current or future application. Section 6 was substantially amended by Congress in the Securities Acts Amendments of 1975. Pub. L. No. 94-29, 89 Stat. 137 (1975). The amended version is approximately four times as long as the original version and much more complex. It accords to the SEC far greater powers to enforce the self-regulatory scheme. *Compare* Section 6 (A102-106) with amended Section 6 (A107-129). Parallel amendments strengthening the role of the SEC were made to related Section 19. *See* Securities Acts Amendments of 1975, *supra*.

Currently, the Exchanges know of only one other pending action involving Section 6. *Rich v. New York Stock Exchange, Inc. et al.*, 73 Civ. 4642 (S.D.N.Y.), in which New York Stock Exchange, Inc. is a defendant, has been on the District Court's suspense calendar since March 18, 1981. The Exchanges are unaware of any actions pending against other registered national securities exchanges raising the question of an implied private right of action under Section 6. Since any new actions which might involve former Section 6

* "A" refers to pages of the appendix to the petition.

should be time-barred under any conceivably applicable statute of limitations, resolution by this Court of the question presented would not "have immediate importance far beyond the particular facts and parties involved." Address of Chief Justice Vinson before American Bar Association (September 7, 1949), 69 S. Ct. v, vi. *See generally Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 78 n.2 (1955). Moreover, this type of case — a suit belatedly commenced against the Exchanges only after a prior litigation against the alleged primary wrongdoers (petitioner's brokers) had been stayed by a bankruptcy filing — is not likely to occur with frequency.

II.

THE COURT OF APPEALS PROPERLY FOLLOWED THE DECISIONS OF THIS COURT

A. The Court of Appeals ascertained Congressional intent under the rules prescribed by this Court.

The language of Section 6 makes no reference to a private right of action against an exchange. The statute, rather, sets forth the prerequisites for exchange registration with the SEC. It is a registration statute—not admonitory, hortatory, or prohibitory. Nowhere does Section 6 accord to public investors the right to enforce that statute. That role is left to the SEC.

The court below properly addressed the question of whether the statute, silent on its face, afforded an implied private right of action under the rules prescribed by this Court in *Cort v. Ash*, 422 U.S. 66 (1975); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979) [*"Redington"*]; *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979) [*"Transamerica"*]; *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981) [*"Middlesex"*]; and related cases cited by the court below at A12-22. The central inquiry remains "one of congressional intent, not one of whether this Court thinks it can improve upon the statutory

scheme that Congress enacted into law." *Redington*, 442 U.S. at 578.

Noting the absence of an express private right of action in the language of Section 6, as differentiated from other provisions of the Exchange Act, the court below, following *Redington, Transamerica,* and *Middlesex,* stated that while this factor alone is not conclusive, it does provide "strong evidence" of Congressional intent not to create additional private remedies by implication. (A16)

The court below meticulously examined legislative history and the place of Section 6 in the comprehensive regulatory scheme of the Exchange Act enacted in 1934. Emphasizing the unique role of national securities exchanges as self-regulators with governmental oversight by the SEC, as recognized in *Silver v. New York Stock Exchange,* 373 U.S. 341, 352 (1963), the court below concluded properly that Congress had deliberately chosen exchange self-regulation over governmental preemption. Congress empowered the SEC to enforce compliance by registered exchanges with their self-regulatory responsibilities by meting out appropriate disciplinary sanctions. *See, e.g., San Francisco Mining Exchange v. SEC,* 378 F.2d 162 (9th Cir. 1967) (withdrawal of exchange registration). The court below noted,

> The clear implication of the legislative history is that Congress has carefully studied and "balanced" the competing considerations and enacted the statutory schema that in its view would best serve its various goals of promoting transactional efficiency, fair dealing, and investor protection, and of limiting expensive and ineffective federal intervention. We cannot infer in the face of all this evidence that Congress nonetheless authorized by implication authority in the federal courts to intervene in the self-regulatory system at the instance of an injured investor and grant redress in the form of a monetary award against an exchange, conditioned on its failure to

> enforce its own rules, for the purpose of coercing or encouraging enforcement. (A21)

Citing *Transamerica,* the Court below concluded that "under the circumstances, we think it 'highly improbable that Congress absentmindedly forgot to mention an intended private action.' " (A21)

B. The Court of Appeals' decision is not in conflict with this Court's decision in *Curran.*

The court below did not follow the "preservation" theory of *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,* — U.S. —, 102 S. Ct. 1825 (1982) (*"Curran"*), for three reasons. First, the events underlying this action antedated by more than a year the 1975 amendments to Section 6 and the attendant legislative history. Second, the court below did not find that the federal courts "routinely and consistently had recognized" an implied cause of action against exchanges under Section 6. *Compare with Curran,* 102 S. Ct. at 1839. The court below was therefore unable to say, as this Court had in *Curran,* that the private right of action sought to be implied was as "uniform" and "well understood" as the private right of action under Rule 10b-5. *Id.* at 1840. Third, the court below found absolutely no legislative history to show that when Congress enacted the 1975 Amendments it was even aware of—much less intended to preserve—a private right of action under Section 6. This is to be contrasted with this Court's finding in *Curran* that Congress, at the time of amendment of the Commodity Exchange Act ("CEA"), was well aware of a private right of action against commodities exchanges and even had rejected a plea to abate those actions. 102 S. Ct. at 1841-42 & n.72.

The court below properly reasoned that Congress' intent in 1975 concerning a private right of action is a matter completely irrelevant to Congress' intent in 1934 when it enacted Section 6. The opinion below accurately observed that "although the 1975 debate is a matter of relevant historical fact and thus appropriate to . . . consideration of Congress'

evaluation of SEC sanctions, we do not think it proper to find by reference to the actions of its 1975 successor that Congress in 1934 intended to create a remedy by implication." (A22)

In *Curran,* this Court said:

> In determining whether a private cause of action is implicit in a federal statutory scheme when the statute by its terms is silent on that issue, the initial focus must be on the state of the law at the time the legislation was enacted . . . When Congress enacts new legislation, the question is whether Congress intended to create a private remedy as a supplement to the express enforcement provisions of the statute. (102 S. Ct. at 1839)

While this Court also pointed out that analysis of Congressional intent may be different when legislation is being reenacted or amended, rather than being enacted *ab initio,* this observation is of no moment to the instant situation. It is beyond dispute that no evidence exists that Congress in 1934 intended there to be any private right of action under Section 6.*

Petitioner argues that the Court of Appeals erred in its reasoning by not considering Congress' intent in 1975 when amending Section 6. Noting that in *Curran* this Court had before it four consolidated cases on appeal—three cases (nos. 80-757, 80-895, and 80-936) dealing with post-amendment transactions alleged to give rise to liability (*i.e.,* the collapse of the May 1976 Maine potatoes contracts), and the fourth

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* Moreover, unlike the legislative history surrounding the 1974 amendments to the Commodity Exchange Act, 7 U.S.C. §§ 1 *et seq.,* which is replete with indications in Congressional hearings and testimony that Congress considered and intended that private rights of action for statutory violations be implied, *see Curran,* - U.S. -, 102 S. Ct. 1825, 1841-44 (1982), the legislative history surrounding the 1975 amendments to the Securities Exchange Act of 1934, and, in particular, Section 6 thereof, is bereft of any such evidence. *See* the analysis presented in the opinion of the court below at A17-19 and A24-25.

case, no. 80-203, dealing with a pre-amendment transaction—petitioner asserts that this Court nevertheless focused on Congress' intent at the time the statute was amended, not enacted, to ascertain the existence of an implied private right of action for all four cases.

Petitioner's analysis is flawed. In 80-203, a suit by a customer against his broker for fraud, the existence of an implied private right of action had always been assumed by the parties (unlike the case at bar) and, therefore, the issue of the existence of the implied right of action sued on was neither raised in the District Court nor in the Court of Appeals. *Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 622 F.2d 216, 230 & n.20 (6th Cir. 1980), *aff'd*, — U.S. —, 102 S. Ct. 1825 (1982). The Court of Appeals for the Sixth Circuit, however, *sua sponte*, raised the question of whether the implied private right of action survived the 1974 amendments to the CEA, an issue it need not have reached, *Burks v. Lasker*, 441 U.S. 471, 475-76 (1979), and concluded that it did. 622 F.2d at 230-35.

This Court affirmed the result reached by the Court of Appeals—that there was an implied right of action following the 1974 amendments. Since all parties had assumed there was an implied private right of action prior to the 1974 amendments, this Court was not asked to and did not apply its interpretation of the 1974 amendments to the CEA, which was substantive legislation, retroactively to the pre-amendment transaction. Indeed, such a holding would have undercut traditional principles of statutory construction. *See Winfree v. Northern Pacific Railway Co.*, 227 U.S. 296, 301 (1913). *See generally* 1A *Sutherland Statutory Construction* §22.36 (4th ed. Sands rev. 1972). In fact, this Court, when granting certiorari in 80-203, after certiorari already had been granted in 80-757, 80-895 and 80-936, specifically limited its review of that case and declined to consider the retroactivity question presented. *See* 451 U.S. 906 (1982). It is unsound

to suggest (as petitioner does) that *Curran* stands for the proposition that Congressional amendment of a statute is probative of Congressional intent at the time of original enactment forty years earlier, especially when the statutory provision at issue only concerns the original enactment.

In any event, the instant situation is different in significant respects from that in *Curran*. Prior to *Curran*, this Court had reviewed an appellate decision where a private remedy under the CEA had been implied. The Court did not question the availability of a private remedy under the CEA, but only focused on the question of primary jurisdiction. *Chicago Mercantile Exchange v. Deaktor*, 414 U.S. 113 (1973). Accordingly, when *Curran* reached this Court, it had been "simply assumed" by this Court that the remedy was available. 102 S. Ct. at 1840.

However, Section 6 does not have a comparable history. This Court has not had an occasion to "assume" that an implied remedy was available. Certiorari was denied in *Baird v. Franklin*, 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944), where a partial dissenting opinion had applied tort principles to imply a private right of action under Section 6 despite the absence of Congressional intent.* A denial of certiorari does not constitute recognition or affirmation, express or implied, of the propriety (or impropriety) of an appellate decision. *See, e.g., United States v. Carver*, 260 U.S. 482, 490 (1923); *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950).

The Court below correctly pointed out that, unlike *Curran*, there was no consensus regarding implication of a private right of action under Section 6 that was as "equally uniform" and "well understood" as that concerning the CEA. Rather, aside from *Baird v. Franklin*, only one other reported

* Significantly, in *Redington*, 442 U.S. at 568, this Court rejected the tort rationale as a basis for implying a private right of action under a statute.

decision* permitted a plaintiff to go to trial on a Section 6 claim. (A23) *But see Jablon v. Dean Witter & Co.*, 614 F.2d 677, 680 (9th Cir. 1980), where the Court of Appeals (interpreting Section 6) relied on this Court's decision in *Redington* and said:

> Congressional intent to provide a private cause of action must . . . be found in § 6(b) alone, [not in the general jurisdictional provision of the statute]. We find no such intent. The Supreme Court has decided that no private cause of action was intended under § 17a of [the same statute] because it "neither confers rights on private parties nor proscribes any conduct as unlawful . . .". We believe this reasoning applies with equal force to § 6(b).

III.

THE ONLY CONFLICT IN THE CIRCUITS IS HISTORICAL, AT BEST

Baird v. Franklin, supra, held that there was a private right of action under Section 6. The tort rationale of *Baird* is contrary to the principles articulated by this Court in *Cort v. Ash* and *Redington*. In no other Court of Appeals case except this case has the issue been litigated of whether there was a private right of action against an exchange under Section 6. The court below, applying the principles of *Cort v. Ash* and *Redington*, correctly held that there was no private right of action under the same statute. *Baird* and this case may present a technical conflict in the circuits, although we question whether the Court of Appeals for the Second Circuit would not today, with the guidance of this Court's decisions in *Cort v. Ash* and *Redington*, overrule *Baird v. Franklin* and follow the decision below. *See Jablon v. Dean Witter & Co.*, 614 F.2d 677. That conflict, however, is not one which should lead this Court to grant certiorari, because the sole effect would be to review the issue of whether there is an implied

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* *Pettit v. American Stock Exchange*, 217 F. Supp. 21 (S.D.N.Y. 1963).

right of action under a statute which has been superseded for the past seven years.

Conclusion

The petition for a writ of certiorari should be denied.

Dated: December 3, 1982

Respectfully submitted,

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Appendix

Pursuant to Rule 28.1, respondents furnish the following list of parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates.

New York Stock Exchange, Inc.

Depository Trust Company
National Securities Clearing Corporation
Securities Industry Automation Corporation

American Stock Exchange, Inc.

Depository Trust Company
National Securities Clearing Corporation
Securities Industry Automation Corporation
The Options Clearing Corporation